United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL and proof of service

74-2239

To be argued by
JESSE BERMAN

B/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 74-2239

MELVIN KEARNEY, :

Appellant. :

----------x

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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TABLE OF CONTENTS

TABLE OF CASES

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-against- :

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ISSUES PRESENTED

1. Whether the Court erred in failing to take judicial notice of California law and in erroneously assuming that a California Youth Authority commitment was a felony conviction. Moreover, whether, even if prospective juror Ramirez had been convicted of a felony, 28 U.S.C. 1865(b)(5), which automatically disqualifies from jury service persons convicted of felonies, violated the Fifth and Sixth Amendments and the rationale of Witherspoon v. Illinois, 391 U.S. 510(1968).

2. Whether the Court improperly limited appellant's cross-examination of Avon White and Joe Lee Jones, while it allowed the Government to explore irrelevant and highly prejudicial matters in the cross-examination of Susanne Jones.

3. Whether the Court, in denying appellant's motion for a new trial, ignored the facts developed at the hearing on the motion and applied the wrong legal standard.

4. Whether the Court erred in its charge on a Federally insured bank and in refusing to charge that White and Jones had been convicted of felonies.

5. Whether the Court, in imposing the maximum sentence allowable and in denying appellant Young Adult Offender status, erroneously relied on the existence of facts and charges of which appellant

had been acquitted.

6. Whether the question of whether Assistant United States Attorney Feinberg's promises should estop the government from maintaining conviction against appellant on Indictment 74 Cr. 242 (in addition to the instant case) should be referred to the panel that hears the appeal of 74 Cr. 242.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Motley, J.), rendered September 16, 1974, convicting appellant after trial by jury of the crime of conspiracy [18 U.S.C. §371], and sentencing him to five (5) years imprisonment.

Timely notice of appeal was filed and this Court, on November 19, 1974, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently serving the sentence pursuant to the judgment herein.

B. Statement of Facts

(1) The Instant Indictment

The indictment herein, filed on November 15, 1973, charged that appellant, together with co-defendants Phyllis Pollard and Joe Lee Jones, Jr., and with Twymon Myers* and Avon White**, committed the crimes of conspiracy

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*/ Twymon Myers was deceased at the time the indictment was filed.

**/ Avon White made a deal with the government which included his not being indicted in the instant case. When the grand jury heard sufficient evidence to indict White, but saw that the government had left his name out of the proposed indictment, they "queried as to why Mr. White was excluded" (Minutes of Joe Lee Jones' guilty plea, May 15, 1974, at p.15). Judge Motley observed that:

[18 U.S.C. §371], bank robbery [18 U.S.C. §2113(a)], bank larceny [18 U.S.C. § 2113(b)] and armed bank robbery [18 U.S.C. §2113(d)] in connection with the July 18, 1973, robbery of the Bruckner Boulevard, Bronx, branch of the First National City Bank.

Phyllis Pollard pleaded guilty, on May 20, 1974, to bank larceny (which carries a maximum penalty of 10 years imprisonment) and was later sentenced to probation, as a young adult offender.

Joe Lee Jones pleaded guilty, on May 15, 1974, to bank larceny (the 10-year count) and was later sentenced to probation, as a young adult offender.

(2) Indictment 74 Cr. 242

On March 12, 1974, appellant was indicted, also in the Southern District of New York, together with Gwendolyn Ferguson*, for bank robbery and armed bank robbery, in connection with the March 16, 1972, robbery of the Crotona Parkway, Bronx, branch of the Bankers Trust Company.

> ...it seems to me that it is improper procedure for the United States Attorney to tell the grand jury who ought to be named as a defendant. That is usurping the function of the grand jury.
>
> (Id. at p. 17)

*/ Gwen Ferguson was a figitive at the time she was indicted, and has continued to remain a fugitive.

(3) The 'Feinberg Promise'

As of June 6, 1974, both the instant indictment and Indictment 74 Cr. 242 (which had previously been assigned to Judge Bauman), had been assigned to Judge Motley. At a pre-trial conference, on June 6, 1974, Judge Motley indicated that she intended to try the instant indictment first, because Joe Lee Jones, who was to testify for the government, had already been in jail for seven months and was then being held as a material witness (F.2).*

Assistant United States Attorney Feinberg requested the Court to reverse the planned order and to try the newer Indictment, 74 Cr. 242, before the instant case. Mr. Feinberg assured the Court that:

> The Government expects that in the event Mr. Kearney is convicted of the [74 Cr. 242] bank robbery we will not prosecute the second case. There will only be one bank robbery tried.
>
> (F.3)

Appellant's counsel argued that the instant case should be tried first, as originally scheduled. He stressed that he was much better acquainted with the facts of this case and that his investigator had already successfully photographed the interior of the bank in question, while he had not been allowed to photograph the interior of the bank in 74 Cr. 242 (F.6).

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*/ "F" refers to minutes of pre-trial conference, June 6, 1974.

Mr. Feinberg argued that there were "many evidentiary problems" with the instant case, and again stated that:

> ...if there is a conviction that will end both of these. We don't contemplate trying the second case.

(F.10)

The Court termed this argument "a very persuasive reason .....because if the Government will drop the second indictment [the instant case] that will certainly save another trial" (F.10).

When appellant pointed out that this 'one-conviction-is-enough' rationale would apply no matter which indictment were tried first, the Court accepted the Government's argument that since its proof was stronger on 74 Cr. 242, it should be allowed to try its stronger case first. Appellant argued that his case was stronger on the instant case and that it was improper for the Court to reverse the order in which the cases had been originally scheduled to be tried merely so that the government could try its stronger case first.

Indictment 74 Cr. 242 was tried on June 17, 18, 19 and 20, 1974, and ended in a hung jury and a mistrial. Immediately after declaring the mistrial, the Court, without asking counsel for their preference, announced that:

> What we will do is to try the next case [the instant indictment] Monday .... and then we will get back to the retrial of this case ..... after that.

(Minutes of first trial of
74 Cr. 242, June 20, 1974,
at p. 397)

Mr. Feinberg reminded the Court that a retrial of 74 Cr. 242 would not be necessary if the instant case "results in any sort of conviction" (Minutes of June 20, 1974, supra, at p. 398, emphasis added).

The instant case was thus tried on June 24, 25, and 26, 1974, and, as will be discussed, infra, it resulted in a conviction. Nevertheless, the government then insisted on retrying 74 Cr. 242, which also resulted in a conviction. Thus, in his post-trial motions, appellant argued, unsuccessfully, that because of the government's promises that one conviction would suffice, the instant judgment should be arrested and the indictment herein should be dismissed.

(4) The Exclusion of Prospective Juror Ramirez

Prospective Juror No. 5, John Ramirez, had been committed to the California Youth Authority when he was 18 years old, some 14 years before the instant trial (D-5,6).* Mr. Ramirez had no doubt that he was sentenced to the California Youth Authority:

> I was sentenced ....to a YA, they called it up there, Youthful Offender. I was a minor .... 18 going on 19.
>
> (D-5)

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*/ The entire voir dire of Prospective Juror Ramirez is reproduced in Appellant's Appendix as Item D, and is paginated "D-1," "D-2," etc.

The Court's initial reaction, before Mr. Ramirez explained that he had been sentenced to the Youth Authority, was that Mr. Ramirez was automatically disqualified as a convicted felon:

> If he has been convicted of a felony, he is disqualified as a matter of law.
>
> (D-3)

Appellant argued that the statute which automatically excludes convicted felons from jury service [28 U.S.C. §1865(5)] is unconstitutional, in that it deprives appellant of a jury of his peers and that "there is nothing in and of the mere fact of a felony conviction that makes one not capable to serve on a jury" (D-4).

When Mr. Ramirez, in response to further questioning, explained that his case had resulted in a Youth Authority adjudication, appellant argued that this was not a conviction for a felony (D-6,8). The Court, however, assumed, that Mr. Ramirez's California Youth Authority sentence was a felony conviction and it excused Mr. Ramirez (D-9).

(5) The Trial

Patrick Walsh, an assistant cashier employed by the First National City Bank, and custodian of the bank's Federal Deposit Insurance Corporation (FDIC) certificates, identified government's Exhibit 1, an FDIC certificate

which he had obtained from the Bruckner Boulevard branch's folder. Mr. Walsh was allowed to testify that the certificate meant that deposits at that branch were insured on the date of the robbery, despite appellant's objections that the insurer, not the insured, was the only competent witness to establish the fact of insurance (T.68-69).* Moreover, appellant argued that since the robbery occurred on July 18, 1973, and since the certificate was dated December 23, 1969, this certificate had no probative value (T.69).

Mr. Walsh acknowledged that other branches of First National City Bank had received FDIC certificates since 1969, but not the Bruckner Boulevard branch (T.71), which had received no FDIC certificates since 1969 (T.72).

Laurence Williams testified that he was manager of the Bruckner Boulevard branch of the First National City Bank on July 18, 1973, when the bank was robbed of approximately $5500 (T.103). Mr. Williams saw a man with a gun, was made to lie down on the floor, was frightened and he "froze." He was unable to say how many robbers he saw and he made no identifications (T.77).

Connie Mangles, a teller at the bank, recalled being robbed that day by three "black people with masks

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*/ "T" refers to the minutes of trial, June 24, 25 and 26, 1974.

on that's all" (T.80). One of the robbers, who jumped over the teller's counter, had a gun. Mrs. Mangles saw a total of three robbers (T.92), and she was unable to identify any of the robbers (T.86).

Maria Rossi, another teller at the bank, testified that the bank was robbed by "about four masked people." Other than recalling that the robbers were black and that one of them had a gun, Mrs. Rossi "was not able to observe them" (T.95). While lying on the floor, she heard shots, but had no idea where the shots came from (T.96). She was not able to identify any of the robbers (T.97).

William Kempey, an assistant professor at Queens College, testified that on July 17, 1973 his 1972 Chevelle station wagon was stolen from him,at knifepoint,by a black man and a black woman, in a Queens College parking lot (T.107-108). His car was dark brown and had New Jersey plates.

On the morning after his car was stolen, Mr. Kempey was shown photographs by the FBI. He chose a photograph of a male who he "thought looked like the individual," and he was unable to identify any photograph of the female. Several months later, the F.B.I. again showed photos to Mr. Kempey and again he was unable to identify the woman. F.B.I. Agent McCartin had told Kempey the name of the person in the photo he had chosen

was Twymon Myers (T. 111).

Carlos Gonsalves, a construction worker, testified that he was outside the bank on the morning of the robbery. He saw two black men leave the bank, enter a dark station wagon bearing New Jersey plates and drive away (T.117-118).

Avon White testified, for the government, on direct examination, that he was "named as a co-conspirator" in the instant indictment, and that he was named as a defendant in an indictment charging robbery of a Manufacturers Hanover Trust Company branch in September, 1972, to which he pleaded guilty and was awaiting sentence (T.134).* White had also pleaded guilty to a state-court charge of attempted murder, in the Bronx, and was awaiting sentence. He was convicted of an unspecified other crime, for which he served time in Elmira, Comstock, and Matteawan State Hospital for the Criminally Insane (T.135). White succeeded in getting from Comstock to Matteawan by telling a prison psychiatrist that "I was God" (T.136).

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*/ The co-defendants who went to trial in the Manufacturers Hanover case, Joanne Chesimard, Fred Hilton, Louis Chesimard, and Paul Stewart, were all found not guilty. Avon White testified against Joanne Chesimard and Fred Hilton in that case.

After being released from Comstock on parole, White violated his parole within five months and was returned to Comstock (T.138).

White denied that any promises had been made to him as to the sentences he would receive for the Manufacturers bank robbery (T.155) or the Bronx attempted murder (T.156). According to White, the exact promise made to him by the government in connection with his cooperation and testimony was:

> I was told that I would be named only as a co-conspirator in this bank robbery and a bank robbery in the Eastern District, which I did, and that at the time of my sentencing before Judge Gagliardi that it will be, you know, mentioned that I was cooperative and the two open counts on the indictment will be dismissed.
>
> (T.156)

Prior to trial, the Court had ordered the government to disclose to the defense its deal with Avon White. The government's response to this order came in the form of Assistant United States Attorney Hemley's letter of March 28, 1974:

> We offer the following statement of the Government's understanding with Avon White: In exchange for Mr. White's cooperation as a witness for the Government, it was agreed that:
>
> (1) he might plead guilty to the bank robbery count (20 yr. maximum penalty) of the three counts in which he had been named in Indictment 73 Cr. 572 [the Manufacturers bank robbery];

(2) at the time of his sentence on Indictment 73 Cr. 572 the Government would consent to the dismissal of the two counts which remain open against him, and call his cooperation to the attention of the sentencing judge;

(3) the Government would decline to prosecute him for his participation in the April 10, 1973 robbery of the Jackson Heights Savings and Loan Association, Northern Boulevard, Queens, New York, and the July 18, 1973 robbery of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York.

(4) at the time of his sentence for attempted murder in the New York State Court, the Government will call to the state court's attention his cooperation in the federal court.

White claimed that in June, 1973, he was living in an apartment with appellant, Twymon Myers, Phyllis Pollard, Robert Hayes and Joe Lee Jones. In the end of June, there was a discussion at which:

> Joe Jones mentioned that he knew where this bank was on Bruckner Boulevard and the following day Phyllis Pollard, you know, went out there and checked it out and did a diagram and brought it back.

(T. 140)

Although White claimed that all of the occupants of the apartment were present, the Court unsuccessfully, pressed White on the question of who said what:

> MR. BERMAN: Your Honor, I object to this testimony unless he says who stated what, rather than this 'we'.
>
> THE COURT: Yes. Tell us as best you can recall who said what, if you can recall.
>
> [WHITE]: Well, it was a group discussion, and I can't, you know, recall who said

what.

(T.141)

Myers and Pollard succeed in stealing a car, and Myers, Pollard and Jones went in the car to the bank on the night before the robbery for "a dry run of the getaway route" (T.149).

White testified that during the robbery, "Twymon Myers was our driver. Joe Jones had the side door. And Phyllis Pollard went over the counter with me" (T.143). According to White, appellant entered the bank, armed, and participated in the robbery, firing one shot (T.152). White also testified, over objection by the defense, that appellant and Jones unsuccessfully sought to obtain a car for the robbery (T. 146-147).

It was White who actually took the money from the bank (T.154).

On cross-examination, White acknowledged that Judge Gagliardi had said that White might be sentenced to four years in custody as a young adult offender (T.159-160).

As for the Eastern District bank robbery, White specifically denied that it was in Jackson Heights, Queens, and he admitted to participation in an armed bank robbery only in Cambria Heights, Queens (T.161). He acknowledged that his Bronx attempted murder plea, which carried a maximum possible sentence of 25 years, was

an indictment which charged attempted murder of a policeman, punishable by a life sentence (T.164-165).

White claimed that he never discussed his Bronx case with his lawyer before pleading guilty (T.166). He also had another attempted murder of police officers case in the Bronx, and both of these two class A felony Bronx cases were consolidated into one Class B felony plea in the Bronx (T.170). He also testified that his understanding was that he would get one federal sentence to cover three armed bank robberies which he had committed, and that the government would not indict him on two of those three armed bank robberies if he testified against appellant (T.172).

It was White's understanding that he would be sentenced in federal court first (T.175), and that the United States Attorney would recommend to the Bronx District Attorney's office that he be sentenced to concurrent time on the Bronx charge (T.176) It was Assistant United States Attorney Peter Treubner who told this to White (T.177). White also had an understanding from Treubner that he would serve his sentence in a federal, rather than state prison (T.206).

Appellant moved to dismiss the indictment, arguing that Mr. Hemley's March 28 statement, in response to the Court's order, of the government's deal with White, left out the promised recommendation of concurrent

federal and state sentences. Mr. Hemley answered that he was "unaware of Treubner saying anything of that nature" to White (T.178)*. Appellant's motion was denied; and the Court ruled, after only 20 minutes of cross-examination (T.157-158), that appellant had:

> ....brought out more than sufficient evidence from which the jury could conclude that this witness has a motive to lie or to exaggerate his testimony. It is exhausted as far as the Court is concerned.
>
> (T.181)

White again claimed that he had never served time other than in Elmira, Comstock and Matteawan (T.182). Appellant then confronted White with a photo of White taken in the Newton, North Carolina, Sheriff's office in 1970, and White admitted being arrested there for possession of a gun, although he denied serving six months in North Carolina on that charge (T.183). A few minutes later, White admitted that he had served the six-month North Carolina sentence (T.197). Later, White admitted serving time in Ossining

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*/ After White finished testifying, Mr. Truebner entered the courtroom and confirmed that he had, indeed, told White that he, Truebner, would speak to the district attorney in the Bronx to facilitate arranging concurrent state and federal sentences for White (T.294, 296, 297).

Correctional Facility and also at the Westchester County Jail in Valhalla (T. 228).

White coyly explained that his parole violation was because "I had something in my possession that I wasn't supposed to have" (T.204). When pressed again as to the other reason for the revocation of his parole, White admitted that he had also been convicted of a crime (T.205).

At the time he went to Matteawan, White believed that he had "supreme powers" and that "the black man was superior to the white man" (T.198). He told the doctors that he was god, although he did not believe he was god, but he insisted that his claim had not been a lie (T.199). He also told the doctors that he had made it rain the previous night (T.200), and that "the black man has seven and one-half ounces of brain and the white man has six" (T.227). He admitted telling the doctors that he was Allah, that he was married to Allah and that Allah's legal name is Robert Walker (T.237-238).

White admitted having used aliases:

> I used so many of them I don't recall them, half of them, most of them.
>
> (T. 211)
>
> I have been using them practically all my life.
>
> (T.212)

To White, the aliases were not lies. Rather, they were:

> just a name I wanted to use
> at that particular time.
>
> (T.239)

Appellant specifically asked White whether on September 17, 1973, the date of his arrest, he had given his full account of the instant robbery to the authorities. White responded that he had not given them a full account (T.217). Appellant's counsel, while thus cross-examining White, was unaware of the fact that the FBI had prepared a written report of White's September 17, 1973 interview, which was inconsistent with his testimony that Phyllis Pollard was the woman involved in the instant robbery. The government had this report, but, despite appellant's demands under 18 U.S.C. §3500 and Brady v. Maryland, the government failed to reveal this report of White's prior statement (See discussion of the 'Margaret statement', infra.)*

The Court refused to allow appellant to ask White what sentence he expected in return for his cooperation

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*/ The government also failed to comply with the Court's order to disclose White's entire criminal record. The version given to the defense on March 28, 1974, failed to include White's January, 1974 indictment for attempted murder of police officers, which was 'satisfied' by one of White's guilty pleas(T.14-16).

in the instant case (T.223), or what type of sentence (T.224). The Court ruled that White could only be asked whether he expected "leniency" (T.224).

Appellant attempted to ask White what was the underlying offense for which he had been sent, as a youthful offender, to the Great Meadow Correctional Facility at Comstock. The government objected, arguing that:

> ....as a youthful offender he need not disclose to this Court or anybody what the underlying charges were.
>
> (T.234)*

Appellant argued that under Davis v. Alaska, __ U.S.____ , 94 S.Ct. 1105 (1974), a defendant's right to cross-examine a witness supercedes the witness' right to confidentiality of a youthful offender adjudication (T.235). The Court ruled that appellant could not so inquire, because the jury had heard "more than sufficient evidence from which [appellant] could argue" that White had a motive to lie (T.236).

Joe Lee Jones testified that he resided in the federal detention facility at West Street, where he had been since November 7, 1973.

Over objection, Jones was allowed to testify that

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* / White's underlying offense was apparently a felonious assault on a police officer (T.235).

he had been in Vietnam with the Marines, had been wounded there (T.254), and had spent ten months in a hospital (T.255).

In June 1973, he was living in an apartment with Avon White, Twymon Myers, Phyllis Pollard, Robert Hayes and appellant. Plans were made to rob the First National City Bank on Bruckner Boulevard, and Phyllis Pollard went out and returned with a description of the physical layout of the bank (T.258-259). Jones, like White, was generally unable to recall who said what during the discussions and was unable to attribute any particular statement to appellant (T.260). He said it was White and Myers who stated that a car could be obtained at Queens College, and it was Myers and Pollard who obtained the car (T.261). Jones, Myers and Pollard went to the bank on the eve of the robbery to prepare their route (T.262), and, on the morning of the robbery, Jones and Myers got the car, had it gassed up, and brought it to the apartment. According to Jones, he, White, Pollard, and appellant entered the bank, while Myers remained outside in the car (T.263). White announced the stick-up and appellant fired a shot (T.266). White and Pollard took the money from the bank and gave it to Myers and Jones (T.267-268).

Jones, named in all four counts of the indictment, had pleaded guilty to the 10-year count (T.269), and was told that the sentencing judge would be advised of

his cooperation (T.271). Jones also testified that he faced possible life imprisonment for being absent without leave (AWOL) from the Marines (T.270).

On cross-examination, Jones claimed that, despite the fact that he had pleaded guilty, he had "committed the [instant] bank robbery unwillfully" (T.274, 319). He directly disputed White's testimony that it was he, Jones, who had first suggested robbing this particular bank (T.275). Jones maintained that Avon White and Twymon Myers were the leaders of the group (T.318).

Jones testified that he had not seen his wife since before his arrest, in November, 1973 (id.).

Jones acknowledged that representatives of the Marines had come to see him at West Street, but he maintained that "They didn't say anything" about his AWOL problem(T.276). Later on in his cross-examination, however, Jones acknowledged that the representatives of the Marines had brought him unconditional discharge papers, which he had signed (T.314), and it was Jones' understanding that if the unconditional discharge papers were accepted, the AWOL matter would probably be dropped (T.315), and the life sentence would be avoided (T.317).

Jones insisted that he did not expect anyone to bring the fact of his testifying for the government to the attention of the Marines, nor did he intend to tell the Marines of his cooperation with the government in

the instant case (T.280). He claimed that such a thought never even crossed his mind (T.281).

Jones also maintained that he could not recall ever being advised that he might be sentenced as a young adult offende in the instant case (T.333, 336).

Appellant sought to question Jones as to whether he had ever been convicted of a crime other than the instant bank robbery (T.281). The government argued that Jones' prior conviction had not been for a felony and that appellant was therefore precluded from using that conviction to impeach Jones' credibility (T.282).

Appellant's counsel informed the Court that the FBI print-out, disclosed to the defense pursuant to the Court's order, gave the charges against Jones as a residential burglary and possession of dangerous drugs for sale. During the instant trial, on the day before Jones took the stand, counsel for the government told appellant's counsel that Jones' burglary and drug charges had resulted in a misdemeanor plea (T.282). The Court ruled that appellant could not ask Jones about the conviction because "the law is that you are limited to felonies" (T.284). The Court also denied appellant's request for a 24-hour continuance to obtain official verification as to whether the conviction was for a felony.

FBI Agent Danny Coulson, called by the defense, testified that on September 26, 1973, he interviewed Avon White. White told Coulson that he had robbed the bank in question together with Jones, Pollard and Myers. White did not mention appellant (T.376).

On cross-examination, Assistant United States Attorney Hemley asked Coulson if he had interviewed White prior to September 26, 1973, and Coulson said that he had (T.395).

Appellant then asked Coulson if he had any "302's"* covering pre-September 26 interview of White. Coulson responded:

> I don't -- all my 302's are in the possession of the United States Attorney's office.
>
> (T.396)

Appellant noted for the record that the only 302's which he had been provided regarding White were those covering the September 26 interview (id.).

FBI Agent Christopher Morrison, called by the defense, testified that on the date of the robbery, he interviewed Mrs. Rossi, one of the tellers who had testified for the government. She told Morrison that the robber who White and Jones claimed was appellant

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*/ "302's" are standard FBI interview reports.

was five feet eight to five feet nine inches tall (T.397).

FBI Agent Robert McCartin, called by the defense, testified that on the date of the robbery, he interviewed Mr. Gonsalves, the construction worker who had testified for the government. He told McCartin that the two men who ran from the bank into the car were five feet seven inches tall (T.399).

Appellant is six feet one inch tall.

Susanne Jones, called by the defense, testified that she was the wife of Joe Lee Jones, and that she had visited Jones at West Street in February, 1974 (T.401). She had spoken to Jones over the phone on the night before she testified and again a week before that. On both occasions Jones told her that he expected to get out of jail as soon as his military discharge came through (T.402).

On cross-examination, over appellant's objection, Mr. Hemley was permitted to ask Mrs. Jones: [1] whether Jones had an affection for his children (T.403), [2] whether she had "any attitudes about the United States government (T.405)*, [3] whether she didn't "like this system of government very much" (T.406), and [4] whether she had ever been a member of the Black Panther Party (T.406). In allowing the fourth question, the Court stated, in the presence of the jury, that:

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*/ Her answer was that she was a registered voter, but did not vote because "there is nobody to vote for" (T.406).

> the government has the .....
> right to show this witness
> has a motive to lie or exag-
> gerate testimony.
>
> (T.407) *

Mr. Hemley, in his summation, stressed the fact that appellant had only attempted to impeach White generally, rather than to impeach him directly on the facts of the robbery (T.468-469).

He also stressed Avon White's testimony that Phyllis Pollard robbed the bank and that Phyllis Pollard had stolen the car (T.473).

Mr. Hemley explained White's denial of the Jackson Heights bank as appellant's counsel's inability to "remember the name of the bank in Queens, or where the bank was located" (T.475).

Mr. Hemley also depreciated the significance of White's deal with the government by insisting that White might get consecutive state and federal sentences (T.477).

(6) The Court's Charge

The Court charged that a witness could be impeached by conviction for a felony, but the Court refused that portion of appellant's Request No. 6, which was to charge that the crimes to which White and Jones had pleaded

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*/ Appellant's motion for a mistrial, based on the Black Panther Party question and the Court's comment on "motive to lie" were denied (T.408-413).

were felonies (T.519).

The Court also refused to charge appellant's Request No. 8:

FEDERALLY INSURED BANK

> The federal character of the institution, in this case the allegation that the bank's deposits were insured by the Federal Deposit Insurance Corporation, is an essential element of the offense. This may be established by presentation of a certificate of insurance for the year in question, or by offering a certificate for some prior year coupled with the testimony of a bank officer that: 1) the insurance premium had been paid annually, and 2) the F.D.I.C. does not cancel the insurance except on notice to the bank, and 3) no such notice had been received by the bank, and 4) the deposits were insured on the date of the robbery;*or, coupled with the testimony of an F.D.I.C. official that a search had been made revealing that, according to F.D.I.C. records, the instant bank was insured on the date of the robbery.**
>
> * U.S. v. Hamilton, 452 F.2d 472, 479 (8th Cir. 1972).
>
> ** Kane v. U.S., 431 F.2d 172, 175-176 (8th Cir. 1970).

(7) The Verdict

The jury found appellant not guilty of all three substantive counts (bank larceny, bank robbery and armed bank robbery), but guilty of conspiracy (T.541).

(8) The Sentence

On September 16, 1974, appellant appeared before the Court for sentencing.

Appellant pointed out several glaring errors in the pre-sentence report. At page two, the report stated

that appellant had stolen $5,538 from the bank on July 18, 1973, the very charge of bank larceny of which he had been found not guilty on Count 2 of the indictment herein (S.341)*.

The pre-sentence report also stated that appellant had been found guilty of the charges (id.).

Under appellant's prior record it listed one case that was in fact still open and had not yet gone to trial, as well as a Bronx attempted murder charge, of which appellant had, in fact, been found not guilty (S.342).

At page six of the pre-sentence report, it is alleged that appellant:

> became a member of the Black Panther Party, a radical political group.
>
> (S.344)

Reference was also made to the Black Liberation Army.

Appellant, at the time of sentence, was 22 years old and had only one prior misdemeanor conviction. He was eligible for Young Adult Offender treatment. Counsel noted that both of his co-defendants (Joe Lee Jones and Phyllis Pollard) had pleaded guilty to the 10-year count and received suspended Young Adult sentences and were placed on probation. Counsel asked the

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*/ "S" refers to the minutes of sentence, September 16, 1974, which are paginated 340 through 355.

Court not to sentence appellant for having gone to trial or for those counts of which he was acquitted (T.347-9). Counsel specifically argued that Young Adult Offender status should not be reserved solely for those who plead guilty (T.348).

The Court stated that it would sentence appellant solely on the basis of the evidence at trial:

> It's on the basis of that evidence alone which the Court sentences the defendant at this time.
>
> (S. 351)
>
> In the[instant case] the evidence disclosed that Mr. Kearney himself fired a firearm.
>
> (S. 352)

Appellant had, of course, been acquitted of such a charge in count 4 of the indictment.

The Court, immediately after the above remark about the firearm, denied appellant Young Adult Offender treatment (S.352) and sentenced him to five years imprisonment, the maximum penalty allowable (S.353).

Immediately after imposing sentence, the Court asked if there were "a motion with respect to the open counts in [the] indictment [herein]" (S.353). Counsel informed the Court that there were no open counts and the Court then remembered: "I am sorry, he was acquitted." But the Court let the sentence stand.

(9) The Motion for a New Trial

On September 26, 1974, appellant moved for a new trial based on his discovery, after the verdict, that the government had failed to disclose prior inconsistent statements of Avon Whtie, which were exculpatory to appellant, and which had been in the possession of the United States Attorney's office at the time of the trial. In addition, appellant discovered, after the verdict, that both White and the government had minimized the extent of the government's deal with White.

A. The 'Margaret Statement'

The trial herein ended on June 26,1974. On September 10, 1974, during the re-trial of Indictment 74 Cr.242, the government gave appellant's counsel a number of FBI 302 forms as '3500 material.' The forms were a random stack of FBI reports in which appellant's name often appeared. Many of these reports were in no way related to the particular case on trial. Among these, appellant's counsel found an FBI report of its September 17, 1973 interview with Avon White. White had been arrested on September 17, 1973, and that report represented his first complete interrogation by the FBI. White was not a witness at the 74 Cr.242 trial, and it appears that his September 17 interview report, prepared by Agents Coulson and Murphy, was included accidentally among the possible 3500 material turned over to appellant during

that trial (N.2)*.

The report states that White told the FBI that:

> On July 18, 1973, AVON WHITE, MELVIN KEARNEY, TWYMON MYERS, the girl named MARGARET and a male by the name of JOE, participated in the armed robbery of the First National City Bank, 1855 Bruckner Boulevard, Bronx, New York. WHITE advised that MYERS and the girl known as MARGARET stole the car used in this robbery from Queens College.**

The Government conceded that it failed in its duty to disclose the above report to appellant:

> The Government readily admits that the FBI report of the September 17, 1973 interview was "3500" material which should have been turned over to Mr. Kearney before the commencement of his cross-examination of Mr. White.
>
> (Mr. Hemley's 'Affidavit in Response to Defendant's Post-Trial Motions,' p.4, paragraph 10.)

At the hearing on the motion, it was established that Assistant United States Attorney Treubner had originally prepared Avon White in connection with

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*/ "N" refers to the minutes of the hearing on the motion for a new trial, October 25, 1974.

**/ This statement by White was referred to, at the hearing on the motion for a new trial and in the Court's opinion on that motion, as the 'Margaret Statement.' The entire 302 report on White's September 17, 1973 interview is reproduced in the government's response to the motion.

the Chesimard-Hilton trial, and that Assistant United States Attorney Daniel H. Murphy II had obtained the instant indictment and was in charge of the instant case until March, 1974, when Mr. Hemley took over (N.4-5)*. Mr. Treubner was unquestionably aware of the existence of the September 17, 1973 report on White's interview, for both Treubner and Judge Bauman had referred to that very report during the Chesimard trial (N.16,28).

When Hemley took charge of the instant indictment, he spoke to Treubner and to Murphy, but he failed to make a serious search for White's 3500 material:

> I did speak to Daniel Murphy, but I don't specifically recall whether I made any direct inquiry as to available FBI reports.
>
> (N.5)
>
> When this case was first reassigned to me, in March of 1974, I went into [Treubner's] office, because I knew that he had prosecuted the Chesimard trial, and I discussed this related trial with him.
>
> Mr. Treubner directed me to a drawer in his filing cabinet which was labeled 'Chesimard' and said that all of the reports which he had were in that drawer... .
>
> (N.29)
>
> * * *
>
> THE COURT: Did you look in the drawer after he said where they were?
>
> MR. HEMLEY: I did not go through all of the material in the drawer... .
>
> (N.30)

* * *

MR. HEMLEY: Your Honor, I am prepared to assume for the sake of this argument that the Government was careless in not turning over to Mr. Berman the report, which admittedly was in Government files.

(N.20)*

B. The Scope of Avon White's Deal

At trial, White had testified that he had participated in three bank robberies, and that his deal with the government encompassed those three bank robberies, two in the Southern District and one in the Eastern District (T.156). Mr. Hemley's letter of March 28, 1974, pursuant to the Court's order that the government disclose its deal with White, maintained that the deal encompassed three bank robberies.** White specifically denied that the Eastern District bank robbery had been in Jackson Heights, and insisted that it was only in Cambria Heights (T.161). Mr. Hemley , in his summation, made fun of what he claimed was appellant's counsel's inability to "remember the name of the bank in Queens or where the bank was located" (T.475).

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*/ After the luncheon recess during the hearing, Mr. Hemley attempted to retract this concession of carelessness, arguing that it was "a conclusion that the Court should reach" (N.22).

**/ See p.12, supra.

In late July, 1974, a month after the trial herein, appellant obtained a copy of Government's Exhibit 14 in the trial of Indictment 74 Cr. 54 (E.D.N.Y.), which is a two-page letter from Robert L. Clary, an Assistant United States Attorney for the Eastern District of New York, to Avon White, confirming the scope of White's deal with all state and Federal authorities.* The letter clearly states that the deal encompassed four bank robberies, two of which were in the Eastern District: Jackson Heights and Cambria Heights. Moreover, the letter makes it clear that the various state and federal prosecutors promised White that they would recommend concurrent sentences.

Mr. Hemley, in his response to appellant's motion for a new trial, conceded the disparities between his March 28 letter and Mr. Clary's letter (Affidavit in Response, supra, p.8, paragraph 20), and acknowledged that he had spoken to Mr. Clary before preparing his own letter.

The Court, in a six-page opinion which makes no mention of the facts developed at the hearing, denied appellant's motion for a new trial.**

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*/ The entire letter is reproduced in appellant's post-trial motion papers.

**/ The Court's entire opinion, dated November 11, 1974, is reproduced in Appellant's Appendix as Item E.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO TAKE JUDICIAL NOTICE OF CALIFORNIA LAW AND IN ERRONEOUSLY ASSUMING THAT A CALIFORNIA YOUTH AUTHORITY COMMITMENT WAS A FELONY CONVICTION. MOREOVER, EVEN IF PROSPECTIVE JUROR RAMIREZ HAD BEEN CONVICTED OF A FELONY, 28 U.S.C. §1865(b)(5), WHICH AUTOMATICALLY DISQUALIFIES FROM JURY SERVICE PERSONS CONVICTED OF FELONIES, VIOLATES THE FIFTH AND SIXTH AMENDMENTS AND THE RATIONALE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510(1968).*

Prospective Juror Ramirez, on voir dire, stated without hesitation that some 14 years before the instant trial he had been committed to the California Youth Authority as an 18-year old minor:

> I was sentenced ... to a YA, they called it up there, Youthful Offender. I was a minor ... 18 going on 19.

(D-5)

Although appellant argued that commitment to the California Youth Authority is not a felony conviction (D-6), the Court assumed that it was (D-9). The Court's assumption was erroneous. California Annotated Code, §17(b)(2), provides as follows:

> §17. Felony; misdemeanor; classification of offenses

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*/ The facts relating to the exclusion of Prospective Juror Ramirez have been set forth in detail at pp.6 and 7, supra.

> (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> (2) When the court commits the defendant to the Youth Authority.
>
> (emphasis added)

It is thus apparent that, as a matter of law, Mr. Ramirez' Youth Authority commitment was not a felony conviction, and that the Court failed to take notice of this:

> [T]he federal court in any district takes judicial notice of the laws of all the states.*
>
> Newman v. Clayton F. Summy Co., 133 F.2d 465, 467, n.3 (2d Cir. 1943).

See,generally, Bowen v. Johnston, 306 U.S. 19(1939).

The Court failed to properly take judicial notice of California law and, based on this error, improperly applied a statutory exclusion to Prospective Juror Ramirez. The judgment must therefore be reversed and a new trial ordered.

Moreover, even if Mr. Ramirez had been convicted of a felony, 28 U.S.C. §1865(b)(5), which automatically excludes persons convicted of a felony, without any voir dire as to their capacity to serve fairly as jurors, is unconstitutional, as appellant argued below (D-4).

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*/ Cf., Rule 26.1, F.R. Crim. Proc., Determination of Foreign Law.

Section 1865(b) provides that a person is deemed:

> ... qualified to serve on grand and petit juries in the district unless he -
>
> (5) ... has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year... .*

In Witherspoon v. Illinois, 391 U.S. 510(1968), the Court struck down a state statute which automatically excluded in capital cases any juror who had conscientious scruples against capital punishment. In Witherspoon, virtually no effort had been made to determine by voir dire whether any of the jurors with such scruples against capital punishment "could nonetheless return a verdict of death" (391 U.S. at 514). The Court found that such a procedure had "produced a jury uncommonly willing to condemn a man to die"(Id. at 521) and deprived the defendant of due process of law.

Applying the Witherspoon rationale to the instant case, nothing in the voir dire of Mr. Ramirez in any way established his inablility to decide the

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*/ 18 U.S.C. §1(1) provides that:

> Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

the case fairly. Rather, the Court automatically disqualified him ,relying on 28 U.S.C. §1865(b)(5), because it believed he had a felony conviction (D-2). Although one might construct arguments that persons convicted of felonies might tend to favor defendants, both Witherspoon's rationale and due process require a voir dire on capacity to serve fairly, rather than automatic exclusion.

The judgment must be reversed and a new trial ordered.

POINT II

THE COURT IMPROPERLY LIMITED APPELLANT'S CROSS-EXAMINATION OF AVON WHITE AND JOE LEE JONES, WHILE IT ALLOWED THE GOVERNMENT TO EXPLORE IRRELEVANT AND HIGHLY PREJUDICIAL MATTERS IN THE CROSS-EXAMINATION OF SUSANNE JONES.*

This case was a very close one. It rested solely on the testimony of two admitted participants in the robbery, Avon White and Joe Lee Jones. Although both White and Jones testified that appellant had actually been in the bank at the time of the robbery,

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*/ The facts relating to this point have been set forth in detail at pp.10-21 and 23-24, supra.

that appellant had been one of the robbers and that appellant had fired a gun while in the bank, the jury completely rejected this testimony by White and Jones, and it acquitted appellant of all three substantive counts.

On the conspiracy count, the testimony of White and Jones against appellant was very limited. Although they claimed that appellant was present when the robbery was discussed, neither White nor Jones were terribly successful in attributing particular statements to appellant:

> THE COURT: Tell us as best you can recall who said what, if you can recall.
>
> WHITE: Well, it was a group discussion, and I can't, you know, recall who said what.
>
> (T.141)*

Indeed, the only testimony as to any act on the part of appellant which could indicate his membership in the conspiracy and which was not implicitly rejected by the jury in its verdict on the substantive counts, was the claim that appellant had joined Jones in an unsuccessful search for a car.** Thus, if appellant had been allowed

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*/ See, also, Jones' testimony, at T.260.

**/ The car was ultimately stolen by Myers (according to Mr. Kempey, White and Jones) and Pollard (according to White and Jones).

more scope in impeaching White and Jones, the jury might well have rejected this last remaining shred of inculpatory testimony against appellant and might have acquitted on the conspiracy count as well.

A. Avon White

White's testimony that appellant and Jones unsuccessfully sought to obtain a car was, of course, hearsay, and it came in over appellant's objection (T.146-147). Appellant was limited in cross-examining White because the government had failed to disclose White's entire criminal record (T.14-16), the government failed to turn over White's 'Margaret Statement' (See Point III, infra), and the government failed to reveal the full scope of the deal with White (Point III, infra).

When appellant tried to ask White what was the underlying offense for his prior youthful offender adjudication, the government objected that such facts were confidential(T.234). When appellant then cited Davis v. Alaska, __ U.S. ___, 94 S.Ct. 1105(1974), as proof that a defendant's right of cross-examination supercedes a witness' claim of confidentiality of youthful offender adjudication, the Court prevented the inquiry, stating that appellant had developed "more than sufficient evidence from which [appellant] could argue" that White had a motive to lie(T.236).

This ruling was clearly erroneous. There is no such legal concept as sufficiency of impeachment. As

long as the material appellant sought to introduce was not repetitive of earlier testimony or insignificant, appellant had a right to have the jury know that White's youthful offender adjudication was based on a felonious assault on a police officer (T.235). Davis v. Alaska, supra.

Perhaps if the government had been more candid in its statement of its deal with White and had fulfilled its duty by turning over the 'Margaret Statement,' the fact of White's assault on a police officer would not have been as significant. But in this particular case, where the jury was close to a complete acquittal, and where the government failed to disclose serious impeaching material, the government must be estopped from now claiming that appellant had sufficient impeaching material without being allowed to bring out the fact of White's assault on the officer.

B. Joe Lee Jones

Jones admitted to no prior criminal record. Other than having his admission of participation in the instant robbery and his acknowledgement that he was absent from the Marines, the jury did not know that Jones had previously been involved in a burglary of a residence and in drug dealing.

On the eve of Jones' testifying, the government told appellant's counsel that Jones' burglary and drug felony arrests had been resolved by a misdemeanor plea. The Court denied appellant's request for a 24-hour conti-

nuance in order to determine whether the conviction had been for a felony or for a misdemeanor. The Court ruled that appellant could not ask Jones about the conviction at all because "the law is that you are limited to felonies"(T.284). In this ruling, the Court erred as a matter of law

> Impeachment of credibility by evidence of past criminal offenses can ... be shown by proof of a conviction of a felony or crimes involving moral turpitude.
>
> United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971), emphasis added.

See, also, United States v. Miller, 478 F.2d 768(4th Cir. 1973). Certainly the possession of dangerous drugs for sale, even if Jones had pleaded down to misdemeanor weight, is a matter of sufficient moral turpitude that the jury should have been allowed to weigh it in evaluating Jones' testimony.

Again, in a case as close as this one, where so much of what Jones said was rejected by the jury, and where the government was guilty of footdragging in promptly disclosing Jones' criminal record to the defense, pursuant to the Court's order of March, 1974, it cannot be said that this curtailment of appellant's cross-examination of Jones was harmless error.

C. Susanne Jones

Merely by way of comparison, we remind this

Court of the unusual scope which the government was permitted in its cross-examination of Susanne Jones, the defense witness.*

She was asked whether Joe Lee Jones had affection for his children, whether she had "any attitudes" about the United States government, whether she liked the government "very much" and whether she had ever been a member of the Black Panther Party. All of these questions were improper.

The oath of a witness is not an oath of allegiance to the government of the United States. If it were, foreigners would be barred from testifying in this country. Susanne Jones swore to tell the truth. The degree of her affection for the party in power or her onetime membership in a particular political party are not relevant to the question of whether her testimony

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*/ It should also be recalled that on direct examination of Joe Lee Jones, the government was permitted, over defense objection, to bring out the fact that Jones had been wounded and had spent 10 months in a hospital. These matters clearly had no bearing on the facts at issue in this case, nor does being wounded say anything about one's character or veracity. The sole purpose in bringing these matters in was to gain sympathy for Jones from the jury, and that, of course, was improper.

was truthful. Indeed, the Black Panther Party may well have been a radical political party of militant blacks, but to attempt to use the fact of past membership in that party to impeach a witness in a not-too-subtle attempt to appeal to the jury's fears and prejudices.

The Court not only allowed the question about the Black Panther Party, but also stated, in the presence of the jury, that:

> the government has the ... right to show this witness has a motive to lie or exaggerate testimony.
>
> (T.407)

The breadth of scope allowed to the government in its cross-examination of this defense witness serves only to underscore the restrictiveness with which the Court curtailed appellant's confrontation of the only two witnesses called against him. The judgment must be reversed and a new trial ordered.

POINT III

THE COURT, IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL, IGNORED THE FACTS DEVELOPED AT THE HEARING ON THE MOTION AND APPLIED THE WRONG LEGAL STANDARD.*

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*/ The facts relating to the motion for a new trial are set forth in detail at pp.10-18,22,24,25 and 28-32, supra.

The newly discovered evidence — White's 'Margaret Statement' and the full scope of the deal with White, both of which were konwn to the government at the time of trial — must be evaluated from two distinct aspects: (1) the manner in which it was withheld and (2) its probative value. The more offensive the manner of the withholding, the less probative the new evidence need be. Giglio v. United States, 405 U.S. 150,154(1972); Brady v. Maryland, 373 U.S. 83(1963); United States v. Badalamente, ___F.2d___, slip op. 5899, 5908 (2d Cir. November 21, 1974); United States v. Zane __F.2d ___, slip op. 227,230(2d Cir. November 4, 1974); United States v. Sperling,____F.2d ____, slip op. 5637, 5649 (2d Cir. October 10, 1974); United States v. Kahn, 472 F.2d 272, 287(2d Cir. 1973).

A careful analysis of the opinion of the Court below reveals that the Court confused the various legal standards developed in the above-cited line of cases and failed to properly apply the facts developed at the hearing on the motion for a new trial.

The Court begins by acknowledging that Avon White was the government's chief witness(E-2)*,and correctly states appellant's position that White's 'Margaret Statement' is both exculpatory and directly

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*/ The Court's opinion is reproduced as Item E in Appellant's Appendix.

impeaching (E-i, note 1).

But the Court then reasons that appellant's claim of intentional non-disclosure of the 'Margaret Statement' "is defeated by the fact" that the government turned over other 3500 and exculpatory material(E-3). Certainly there is no legal support, in the cases cited above or elsewhere, for this novel theory that partial disclosure rebuts any claim of intentional non-disclosure of that which has not been disclosed. Nor does such a theory find any support in logic.

Then, having summarily disposed of intentional non-disclosure, the Court, citing Kahn, supra, states that:

> if it is shown that the evidence was of such a high value that it could not have escaped the prosecutor's attention, relief would be warranted without requiring a showing that the suppression was intentional.
>
> (E-3)

This proposition is correct. However, the Court denied relief, holding that "the 'Margaret Statement' was not of such a high value that it could not have escaped the prosecutor's attention" (E-4). This ruling ignores the fact that the 'Margaret Statement' did not escape the government's attention: Mr. Treubner knew about it (N.16,28). Mr. Treubner was present during part of the instant trial(T.294-297). In advance of trial, Treubner had told Hemley where to find the Avon White material:

> Mr. Treubner directed me to a drawer in his filing cabinet which was labeled 'Chesimard' and said that all of the reports which he had were in that drawer ... .
>
> (N.29)
>
> * * *
>
> THE COURT: Did you look in the drawer after he said where they were?
>
> MR. HEMLEY: I did not go through all of the material in the drawer ... .
>
> (N.30)
>
> * * *
>
> MR. HEMLEY: Your Honor, I am prepared to assume for the sake of this argument that the Government was careless in not turning over to Mr. Berman the report, which admittedly was in Government files.
>
> (N.20), emphasis added.

It was thus never really a question of whether the 'Margaret Statement' could have escaped the prosecutor's attention. It was known to Treubner and he brought it to Hemley's attention when he directed Hemley to the file drawer. Hemley was then concededly "careless" - indeed, grossly negligent - in not going through all the material in that drawer.*

> Less exacting standards ... are required in cases involving prose-

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*/ The Court's opinion makes no mention of the facts conceded by Hemley at the hearing.

cutorial misconduct or negligence.

> United States v. Zane, supra, slip op. at 230, emphasis added.

As the Supreme Court has observed:

> whether the disclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. ... procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.
>
> Giglio, supra, 405 U.S. at 154, emphasis added.

The Court below ignored the concept of prosecutorial negligence, and saw intentional suppression or "inadvertence" as the only possible alternatives (E-4). Thus, when the Court reasoned that inadvertence was the only possibility, and found that the "same information [as in the'Margaret Statement'] was available in other reports," it went on to cite dictum in Sperling, supra, as supporting the proposition that inadvertent suppression of "such" FBI reports does not warrant a new trial. Here, however, the Court was ignoring the facts: White's reference to the woman participant as 'Margaret' was not available in any "other reports" or anywhere else. Moreover, the report in Sperling was only collaterally impeaching*, while the 'Margaret Statement' was directly

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*/ It showed that the witness, Lipsky, had received favors from the government in the past and that he expected favors in the future. Sperling, supra, slip op. at 5648.

impeaching of Avon White's testimony that Phyllis Pollard was a member of the conspiracy.* Additionally, it was exculpatory to appellant on the conspiracy count, for the jury was instructed that it could find appellant guilty if it found that he conspired with Pollard or that Pollard had committed an overt act.**

Thus, even if the government never knew that it had the 'Margaret Statement' in its possession, its probative value was sufficient to merit a new trial. In this case, however, since the government knew of its existence, the standard should be one of whether the statement was "favorable to the defense" (Kahn, supra, 472 F.2d at 287) and, as it certainly was favorable to

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* / Except for bringing out the fact that White had on September 26, 1973, failed to mention appellant's name (T.376), appellant, at trial, had nothing else with which to directly impeach White.

** / Mr. Kempey, it will be recalled, identified Myers' photo, but never identified Pollard. Appellant was acquitted of all the substantive counts and was only convicted of conspiring with Myers (who was dead at the time of trial) with White and Jones, and with Pollard. The Court noted that:

> The court agress with defense counsel that the 'Margaret Statement' is relevant to the conspiracy count of which defendant was convicted.

(E-5)

to the defense, a new trial must be ordered.

Even if the most severe test as to the probative value of the evidence should have been applied, the Court below misstated that test. That test, cited by this Court in Sperling, supra, is whether there was a significant chance that the evidence, "developed by skilled counsel ..., could have induced a reasonable doubt... ." (Slip op. at 5649, emphasis added). The Court below stated the standard as one of whether the evidence "...would have induced a reasonable doubt ... ." (E-5, emphasis added).

Finally, this Court should not evaluate the withholding of the 'Margaret Statement' in a vacuum. It must also be recalled that appellant did not learn until after the trial that the government failed to reveal the full scope of White's deal: the fact that it covered two Eastern District bank robberies, after Hemley had derided, in his summation, defense counsel for suggesting a second Eastern District bank robbery(T.475). This must be added to the government's failure to disclose, before trial, its promise to recommend concurrent state and federal sentences for White, and to its failure to promptly disclose White's entire criminal record.

A full assessment, under the proper legal standards, of the government's dereliction herein, of the probative value of the 'Margaret Statement' and of the entire deal

with White, and of the closeness of the this case in view of the rejection of all the substantive counts and the rejection of the majority of White's and Jones' testimony, compels reversal and a new trial in this case.

POINT IV

THE COURT ERRED IN ITS CHARGE ON A FEDERALLY INSURED BANK AND IN REFUSING TO CHARGE THAT WHITE AND JONES JONES HAD BEEN CONVICTED OF FELONIES.*

Mr. Walsh, an assistant cashier at the bank, produced a 1969 F.D.I.C. certificate from the Bruckner Boulevard branch's folder and he testified, over objection, that this certificate meant that that branch was insured on July 18, 1973. He acknowledged that other First National City Bank branches had received F.D.I.C. certificates since 1969 and that the Bruckner Boulevard branch had not.

The Court charged that the fact of F.D.I.C. insurance was one element of each of the substantive counts(T.509,513). It did not mention F.D.I.C. insurance at all in connection with the conspiracy count(T.499-500). This was plain error.

Moreover, the Court refused to give the F.D.I.C. charge in the form requested by appellant**.

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*/ The facts relating to the Court's charge are set forth in detail at pp. 7-8 and 24-25, supra.

**/ See p.25, supra.

Since the 4-year old certificate offered by Mr. Walsh did not by its own terms cover the bank on the date of the robbery, the jury was effectively allowed to find the element of F.D.I.C. insurance merely from an assistant cashier's having said so.

This must be insufficient. There was no proof offered as to either payment of F.D.I.C. premium or absence of notice of cancellation. See, United States v. Hamilton, 452 F.2d 472, 479 (8th Cir. 1972). Nor was there any testimony from any F.D.I.C. official as to what F.D.I.C. records indicated. See, Kane v. United States, 431 F.2d 172, 175-176 (8th Cir. 1970).

It was a question of fact for the jury to decide, whether there was proof beyond a reasonable doubt that the bank was federally insured. But the Court's failure to charge as appellant requested resulted in the jury's being permitted to find this element solely because of the cashier's conclusory testimony to that effect.

With regard to Jones and White, the jury heard testimony that they had been convicted of crimes. The Court instructed the jury that conviction of a felony might impeach a witness. But the Court refused to charge the jury that Jones and White had been convicted of felonies.

The legal classification of White's and Jones' crimes was a legal matter about which the Court had a duty

to instruct the jury, especially when so requested by appellant.* The failure to do so, especially in this case, where the jury rejected most of White's and Jones' testimony, was not harmless error, and the judgment must be reversed and a new trial ordered.

POINT V

THE COURT, IN IMPOSING THE MAXIMUM SENTENCE ALLOWABLE AND IN DENYING APPELLANT YOUNG ADULT OFFENDER STATUS, ERRONEOUSLY RELIED ON THE EXISTENCE OF FACTS AND CHARGES OF WHICH APPELLANT HAD BEEN ACQUITTED.**

After appellant pointed out that the pre-sentence report had referred to appellant as having been convicted of crimes for which he had been acquitted, the Court said it would sentence appellant solely on the basis of the evidence at trial (S.351). The Court then cited the testimony that appellant had fired a firearm during the bank robbery (S.352) and, immediately after noting

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*/ Jones, for example, admitted to no more than conviction for bank larceny, and the jury may not have known that bank larceny is a felony.

**/ The facts relating to appellant's sentence are set forth in detail at pp. 25-27, supra.

this "fact," the Court denied appellant Young Adult Offender treatment and sentenced him to the maximum allowable term of imprisonment (S.353).

This was error, because appellant was acquitted of all substantive counts, including, specifically,armed bank robbery (Count 4).* A sentence cannot be based on facts which are incorrect or inadmissible, or upon charges for which a defendant has not been convicted. United States v. Tucker, 404 U.S. 443(1972); Townsend v. Burke, 334 U.S. 736, 740-741(1948); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970); Verdugo v. United States, 402 F.2d 599(9th Cir. 1968).

> Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.
>
> Malcolm, supra, 432 F.2d at 816.

Appellant,who was acquitted of firing a gun and acquitted of bank robbery, remains forever clothed in the presumption of innocence as to those charges, and to have his sentence, even in part, based upon those charges violated due process.

The judgment must be reversed and the matter remanded for resentencing.

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*/ The Court also referred to "open counts," of which there were none (S.353).

POINT VI

THE QUESTION OF WHETHER ASSISTANT UNITED STATES ATTORNEY FEINBERG'S PROMISES SHOULD ESTOP THE GOVERNMENT FROM MAINTAINING CONVICTION AGAINST APPELLANT ON INDICTMENT 74 CR. 242 (IN ADDITION TO THE INSTANT CASE) SHOULD BE REFERRED TO THE PANEL THAT HEARS THE APPEAL OF 74 CR. 242.*

Appellant contends that Mr. Feinberg's promises of June 6 and June 20, 1974, should estop the government from maintaining more than one conviction against appellant under the instant indictment and under 74 Cr. 242. See Santobello v. New York, 404 U.S. 257(1971); Giglio v. United States, supra, 405 U.S. at 154.

Since Mr. Feinberg maintained that a re-trial of 74 Cr. 242 would not be necessary if the instant case "results in any sort of conviction" (Minutes of June 20, 1974, in 74 Cr. 242, at p.398), it is our contention that, should the instant judgment be affirmed by this Court, the question of whether such a conviction bars the conviction on 74 Cr. 242 should be referred to the panel that hears the appeal of 74 Cr. 242.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED. IN THE ALTERNATIVE, THE MATTER SHOULD BE REMANDED FOR RE-SENTENCING.

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*/ The facts relating to the 'Feinberg Promise' are set forth in detail at pp. 2-6, supra.

Respectfully submitted,

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Counsel for appellant wishes to thank Steven Bernstein, law clerk, for his indispensable assistance in the preparation of this brief.